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C.D., Appellant)	
)	
and)	Docket No. 11-598
)	Issued: September 23, 2011
U.S. POSTAL SERVICE, GENERAL MAIL)	
FACILITY, Boston, MA, Employer)	
)	

Francis J. Hurley, Esq., for the appellant
Office of Solicitor, for the Director

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On May 6, 2009 appellant, then a 50-year-old mail handler, was injured while manually unloading trucks on the loading dock. She stopped work that day. OWCP accepted that appellant sustained an employment-related left wrist sprain, contusion of the left elbow, a bilateral shoulder sprain and a thoracolumbar sprain of the back.

By letter dated October 16, 2009, OWCP informed appellant that a medical management nurse, Joyce DeChristopher, was assigned to facilitate her recovery. Ms. DeChristopher made numerous attempts to contact appellant by telephone and correspondence. Appellant did not respond and the nurse visitation case was closed.

On December 1, 2009 OWCP informed appellant that an appointment had been made to obtain a second opinion evaluation to address the nature of her condition, the extent of disability, and appropriate treatment. Appellant was informed of her responsibilities, and that her compensation could be suspended for failure to attend the examination. On December 2, 2009 she was informed by QTC Medical Services, OWCP's medical scheduler, that an appointment had been made with Dr. Joel A. Saperstein, a Board-certified orthopedic surgeon, at 10:30 a.m. on December 14, 2009. Appellant did not attend the scheduled appointment.²

On December 22, 2009 OWCP proposed to suspend appellant's compensation benefits on the grounds that she failed to appear for the examination scheduled with Dr. Saperstein on December 14, 2009. Appellant was informed of the penalty provision of section 8123(d) of FECA and was given 14 days to provide in writing good cause for her failure to appear. She was also advised to contact OWCP immediately if she intended to report for a rescheduled examination.³

By letter dated January 6, 2010, appellant informed OWCP that she did not receive notice of the appointment. On January 6, 2010 a QTC scheduler informed OWCP that she had called her to reschedule the missed appointment. Appellant submitted a number of treatment notes and disability slips from Dr. Olarewaju J. Oladipo, an orthopedic surgeon, dated from December 15, 2009 to June 15, 2010. Dr. Oladipo provided examination findings and diagnosed low back pain, headache, bilateral elbow pain, upper back pain, left elbow swelling, left wrist pain with swelling, bilateral foot pain and bilateral leg swelling. He made treatment recommendations and advised that appellant could not work.

In a January 21, 2010 decision, OWCP finalized the proposed suspension, effective January 7, 2010. It found that appellant did not attend the appointment scheduled for December 14, 2009. OWCP acknowledged receipt of her letter stating that she had not received the appointment notice and informed her that, in the absence of evidence to the contrary, a notice mailed to an individual in the ordinary course of business was presumed received by that

² Physical therapy services were discontinued on December 24, 2009 secondary to noncompliance. The physical therapist noted that appellant stated that she was in too much pain to do physical therapy and would not return.

³ The record contains a second copy of the proposed suspension, dated December 23, 2009, signed by a second senior claims examiner.

individual. OWCP informed appellant that wage-loss compensation would be reinstated after she attended and fully cooperated with an examination.

On February 10, 2010 appellant, through her attorney, requested a hearing. On February 19, 2010 counsel called OWCP to inquire about rescheduling the second opinion evaluation. An appointment with Dr. Saperstein was rescheduled for 9:30 a.m. on April 9, 2010. Appellant attended the scheduled appointment and her compensation was reinstated effective that day.

At the May 4, 2010 hearing, appellant's attorney asserted that she had always been cooperative with OWCP, and that the record contained conflicting information regarding the appointment scheduled in December. Appellant testified that she did not receive the appointment notice. She stated that in December mail was delivered by casual employees who were not trained and who threw mail away, that it was very common to lose mail, and that first class mail effectively became second class mail with no delivery priority. Subsequent to the hearing, appellant's attorney submitted copies of separate letters dated December 1, 2009 notifying appellant that an appointment would be scheduled, a notice dated December 2, 2009 in which QTC notified appellant of the appointment scheduled with Dr. Saperstein on December 14, 2009, and a second QTC appointment letter dated December 3, 2009.

By decision dated July 20, 2010, an OWCP hearing representative affirmed the January 21, 2009 OWCP decision.⁴

LEGAL PRECEDENT

Section 8123 of FECA authorizes OWCP to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.⁵ The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of OWCP.⁶ OWCP regulations at section 10.320 provide that a claimant must submit to examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.⁷ Section 8123(d) of FECA and section 10.323 of OWCP regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.⁸ OWCP procedures provide that before OWCP may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁹ If good

⁴ On July 20, 2011 appellant filed an appeal with the Board of an April 12, 2011 OWCP's hearing representative decision. It will be adjudicated separately under Docket No. 11-1789.

⁵ 5 U.S.C. § 8123.

⁶ *J.T.*, 59 ECAB 293 (2008).

⁷ 20 C.F.R. § 10.320.

⁸ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000); *J.T.*, *supra* note 6.

cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹⁰

In the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.¹¹

ANALYSIS

The Board finds that appellant refused to submit to the scheduled December 14, 2009 second opinion examination with Dr. Saperstein within the meaning of section 8123 of FECA. OWCP directed appellant to attend a second opinion evaluation with Dr. Saperstein, a Board-certified orthopedic surgeon. It properly determined that it required an assessment of appellant's employment-related condition, medical treatment and continuing disability.

By letter dated December 1, 2009, OWCP informed appellant that a second opinion evaluation was needed and that her compensation could be suspended if she failed to attend the examination. On December 2, 2009 appellant was informed that an appointment had been scheduled with Dr. Saperstein for a second opinion evaluation, at 10:30 a.m. on December 14, 2009. The notice was sent to her address of record.

Appellant did not attend the December 14, 2009 appointment. In a December 22, 2009 notice, OWCP afforded her 14 days to provide good cause in writing for her failure to attend the scheduled examination. Appellant was advised of the penalty provision of section 8123(d) of FECA for failure to attend such an examination.

The Board has recognized OWCP's responsibility in developing claims.¹² Section 8123 authorizes an employee who claims disability as a result of federal employment to undergo a physical examination as OWCP deems necessary. The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of OWCP. The only limitation on this authority is that of reasonableness.¹³ The referral to an appropriate specialist in appellant's area at OWCP's expense was not unreasonable. In this case, OWCP acted within its discretion by referring appellant for a second opinion examination to assess residuals and disability related to her employment-related conditions.

By letter dated January 6, 2010, appellant advised OWCP that she did not receive the appointment notice. As noted, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that

¹⁰ *Id.*

¹¹ *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

¹² *Scott R. Walsh*, 56 ECAB 353 (2005).

¹³ 20 C.F.R. § 10.320; *see J.T.*, *supra* note 6.

individual.¹⁴ Under the mailbox rule, evidence of a properly addressed letter, together with evidence of proper mailing, may be used to establish receipt.¹⁵ The case record contains a properly addressed copy of the December 2, 2009 letter notifying appellant of the scheduled medical appointment. While appellant submitted different letters dated December 1, 2009, this is not sufficient to rebut the presumption of mailing. Her hearing testimony regarding poor delivery practices during the holiday season is not sufficient to rebut the presumption without proof of nondelivery.

The Board finds appellant failed to attend the scheduled December 14, 2009 medical examination and did not provide good cause for her failure within 14 days of OWCP's December 22, 2009 notice of proposed suspension. The Board finds that OWCP properly suspended her compensation benefits effective January 7, 2010.¹⁶

The Board notes that section 8123(d) provides that an employee's right to compensation is suspended until the refusal or obstruction stops, not when OWCP verifies that a rescheduled examination has taken place. When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made.¹⁷ OWCP received notice from appellant's attorney on February 19, 2010 that she was willing to attend a rescheduled medical examination, which she attended on April 9, 2010. The suspension of her wage-loss compensation should have ceased as of February 19, 2010. On return of the case record to OWCP, it should reinstate her compensation benefits as of February 19, 2010.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits effective January 7, 2010, as she failed to attend a scheduled medical examination without showing good cause for her refusal.

¹⁴ *C.T.*, *supra* note 11.

¹⁵ *Joseph R. Giallanza*, 55 ECAB 186 (2003).

¹⁶ *J.T.*, *supra* note 6.

¹⁷ *Sharon Handy*, 57 ECAB 446 (2006).

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2010 decision of the Office of Workers' Compensation Programs be affirmed as modified.

Issued: September 23, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board